

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NEW YORK LIFE
INSURANCE COMPANY

CA NO. 14-74 S

Plaintiff

vs

PROVIDENCE, RI

AUGUST 1, 2014

MASSIEL ORTIZ
JULIA KLAH

Defendant

BEFORE: MAGISTRATE JUDGE PATRICIA A. SULLIVAN

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

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1 AUGUST 1, 2014

2 THE COURT: Good morning, everyone. We are here
3 in the matter of New York Life Insurance vs Massiel
4 Ortiz and Julia Klah. This is Civil Action 14-74 S, and
5 we are here this morning to hear argument on two
6 motions. First we have plaintiff's motion for
7 interpleader relief, which is ECF 14, and second
8 plaintiff's motion for summary judgment directed towards
9 defendant Massiel Ortiz's counterclaim. That is ECF
10 number 16. Before we begin, would counsel enter your
11 appearances, please, for the record?

12 MR. MAGRATTEN: Brooks Magratten for the
13 plaintiff New York Life.

14 MR. RODIO: Stephen Rodio for Ms. Ortiz.

15 MS. FELIX: Michelle Felix for Ms. Ortiz.

16 THE COURT: All right. All right, Mr. Magratten,
17 you are the plaintiff and the movant so I'll hear from
18 you first.

19 MR. MAGRATTEN: Good morning, your Honor.

20 THE COURT: Good morning.

21 MR. MAGRATTEN: You know the circumstances behind
22 the case are tragic indeed. It involves the death of a
23 22 year old young man who apparently was an accomplished
24 musician in March of 2013, his body was discovered on
25 fire in a Cranston cemetery, and approximately four

1 months before then he had purchased a \$450,000 life
2 insurance policy with New York Life. Following his
3 death, local authorities contacted New York Life about
4 the policy. New York Life was subpoenaed by the
5 authorities, turned over documents related to the
6 policy, and what followed then, I think about a month
7 later, was a claim received by the primary beneficiary,
8 Ms. Ortiz, and what followed then are really two
9 investigations. One into Mr. Kaydea's death by -- and
10 it appears that both the Cranston Police and Rhode
11 Island Attorney General personnel were involved in that
12 investigation. Second, because death arose within the
13 contestability period under the policy New York Life
14 did, as it normally does in those circumstances, begin a
15 contestability investigation in which it requested
16 medical records, pharmacy records, criminal records, to
17 investigate the representations in the application.

18 THE COURT: One question on that point,
19 Mr. Magratten, my observation is that the only, of all
20 the facts that have been presented by all the parties,
21 the only dispute is whether the contestability
22 investigation was routine and the defendant Ortiz has
23 presented record references suggesting that the
24 investigation became -- I can't remember the term that
25 it went from standard to extreme, non-standard.

1 MR. MAGRATTEN: Correct.

2 THE COURT: But as I read the underlying facts,
3 and I don't know if we can sort of kind of reach the
4 point where this fact is undisputed, and obviously I'm
5 going to hear from Ms. Ortiz's counsel on this, but it
6 seemed as if it was a routine contestability
7 investigation. That is the initial letter seems to be a
8 very routine letter, but as the contestability
9 investigation proceeded it became different from routine
10 because of the unusual circumstances.

11 MR. MAGRATTEN: I think that's a fair
12 characterization. I asked my client the same question
13 that Mr. Rodio has raised, we're dealing here with death
14 by strangulation, what does medical history have to do
15 with this, and we're in a state where in order to
16 rescind coverage you have to show that the
17 misrepresentation was related in some fashion to the
18 cause of death. That's not the case in every state, and
19 what I've been informed by New York Life is when death
20 does occur within a contestability period the standard
21 operating procedure go out and start looking for these
22 records. What became of interest particularly in the
23 circumstances of this case was a suggestion by
24 authorities that this death was gang related, and there
25 is a question in the application requiring the applicant

1 to respond as to whether, in this case, he has been
2 convicted of a crime, pled guilty of a crime, or whether
3 there were any criminal charges then pending. Now for
4 that reason they, New York Life requested, or tried to
5 get criminal records from Providence Police and from
6 Cranston Police pertaining to Mr. Kaydea. They were
7 ultimately unsuccessful in getting all those records
8 except they were informed by Cranston Police that Mr.
9 Kaydea did have an arrest record. And it's not -- I
10 think it would be an overstatement to say that medical
11 records in this case would be completely irrelevant.
12 And let's take the case, for example, that there are
13 medical records out there which indicate that Mr. Kaydea
14 has had a history of stab wounds, gunshot wounds, other
15 physical conditions that might point to gang
16 involvement, or criminal involvement. I have absolutely
17 no basis in fact that to know that that is the case.
18 I'm just spinning a hypothetical here as to why --

19 THE COURT: Right. But at the outset of the
20 investigation New York Life doesn't know what we know
21 now and therefore -- and would it be correct that the
22 letter that New York Life first sent, I think it was
23 May 2nd, and the array of records that were reflected in
24 that letter, are what would be done in any instance
25 where the death occurs within the contestability period

1 as the first thing that happens.

2 MR. MAGRATTEN: Yes, yes, that's very much --

3 THE COURT: So to that extent it's routine.

4 MR. MAGRATTEN: Standard operating procedure. I
5 think the thrust of Ms. Ortiz objections to this motion
6 seems -- she raises the defense of laches and she's
7 concerned about the time lapse. And again I come back
8 to what was going on during the period. New York Life
9 made the request for medical records. There was
10 difficulty on Ms. Ortiz's part responding because she
11 had no legal relationship with the decedent. She was a
12 girlfriend for a period of time and the mother of the
13 child born out of that relationship but she engaged a
14 law firm in Rhode Island different than the one
15 currently engaged to help get the records. They were
16 unable to provide the records, and this process went on
17 all the way up through the fall towards the end of 2013,
18 and during the same time New York Life was checking in
19 routinely with authorities. Very significantly, I
20 believe it was May or June of 2013, the authorities
21 informed New York Life that in this case the family and
22 the beneficiary are persons of interest in the
23 investigation.

24 So going forward, New York Life's investigator would
25 contact authorities every month, every two months, all

1 the way up through, I believe, early January 2014 to
2 find out about the status of the investigation. They
3 were always told the investigation was still ongoing.
4 They were told it was very active. And no one can be
5 ruled out.

6 THE COURT: Was Ms. Ortiz, or her counsel, put on
7 notice that part of the thrust of the contestability
8 investigation was a slayer statute problem? Was she
9 ever informed of that? And if not, is there a reason to
10 explain it? I'm not sure it's material but it's
11 certainly something that the defendant has raised.

12 MR. MAGRATTEN: I'm not aware of any written
13 communication made to -- I mean, from the file I have, I
14 have not seen any written communication to Ms. Ortiz
15 that addresses the slayer statute problem, although I
16 would argue whenever you have an investigation and the
17 beneficiary has been identified as a person of interest,
18 it can't be ruled out. That's always a concern on the
19 part of the insurer. So I think further, the second
20 half of 2013 there were these two things going on.
21 Number 1, they're still trying to get the medical
22 records which were proving to be extremely difficult to
23 obtain, and at the end of 2013, the beginning of 2014
24 New York Life essentially says okay, we've tried to get
25 medical records, we can't get medical records, we're not

1 going to get any more criminal records, we've done --
2 we've followed this investigation to the end of its rope
3 and we have no basis to rescind the policy, so we
4 determined that benefits are now payable. The further
5 complication at this point was clearly we have a claim
6 by the primary beneficiary to the policy proceeds. The
7 primary beneficiary has been identified as a person of
8 interest. He cannot be ruled out in the investigation
9 of
10 Mr. Kaydea's death. But further there was a telephone
11 conversation between the New York Life's sales agent,
12 the agent who sold this policy, and the secondary
13 beneficiary, Ms. Klah, who I understand is a resident of
14 Pennsylvania. Ms. Klah at that time, according to the
15 sales agent, the telephone conversation, Ms. Klah was
16 very angry. She was distressed, naturally, that her son
17 had died. She was further distressed to learn that a
18 life insurance policy had been taken on his life months
19 before his death. She was in further distress to learn
20 that the primary beneficiary was Ms. Ortiz who Ms. Klah
21 did not particularly care for. Ms. Klah told the New
22 York Life sales agent that she was then speaking to the
23 FBI about the matter, and she did not want to see
24 insurance proceeds paid to anyone. That was the
25 substance of that conversation.

1 Following that point, New York Life was aware
2 certainly of the possibility of competing claims to the
3 benefit, and then Ms. Klah proceeded to retain counsel
4 in Rhode Island, Mr. Corley, who has not filed an
5 objection to this motion, to these motions. Mr. Corley,
6 in turn, hired an investigator who's been looking into
7 the matter and in response to the interpleader complaint
8 Ms. Klah in fact did file a cross-claim which remains
9 pending by claiming an interest in the death benefits.
10 I think your Honor will probably recall from the Rule 16
11 conference we had in the matter there was some
12 discussion between beneficiaries trying to reach an
13 agreement to set aside some funds for the minor child,
14 but, apparently those have not progressed any further.
15 So on this basis, New York Life is doing -- trying to
16 accomplish two things: One, leave to permit to deposit
17 the funds in the registry of the court, net of
18 attorney's fee claim of approximately \$12,000. In
19 response to the --

20 THE COURT: Plus whatever interest might be.

21 MR. MAGRATTEN: Yes, and that's a separate issue.

22 THE COURT: Right.

23 MR. MAGRATTEN: That's been briefed and the Court
24 needs to address. In response to the complaint, New
25 York Life received from Ms. Ortiz a counterclaim of

1 consisting of seven counts, breach of contract,
2 negligence, breach of the duty of good faith and fair
3 dealing, trade practices claim, bad faith. I'm not sure
4 I've named them all but essentially New York Life's
5 position is, that still to their essence, the essential
6 claim of each of these counterclaims is you should have
7 paid me the money alone right away. Your failure to do
8 that has caused me harm. New York Life has cited the
9 Hovis case out of the Third Circuit which discusses the
10 fact that counterclaim relief of that nature is
11 inconsistent with the basic principles of interpleader
12 relief. When an insurer is faced with competing claims
13 or other impediments to paying a benefit it should be
14 allowed to seek interpleader relief and have the Court
15 resolve the issue of who is entitled to funds
16 particularly in a case like this where unfortunately the
17 facts give rise to many issues that need to be
18 addressed. So New York Life would ask that the
19 counterclaims be dismissed as a matter of law.

20 THE COURT: Let me stop you on the Hovis case
21 because it's interesting and it certainly -- I mean it
22 appears to be the policy goal that if during the period
23 of contestability the insurance company does a routine
24 investigation, routine being look at all the things that
25 might lead to either the voiding of the policy or some

1 question as to where the policy goes, and then within a
2 reasonable amount of time files an interpleader action
3 as a matter of law counterclaimed by the people who are
4 sued in the interpleader go away without further
5 inquiry. Here is my concern, and it looks like your
6 arguing -- you've kind of got two arguments that the
7 counterclaim goes away. One is sort of a Hovis
8 principle as a matter of law, go no further; and then
9 second, your summary judgment motion says now let's go
10 into the facts, the undisputed facts which appear to be
11 almost entirely undisputed and decide whether or not
12 there is a claim here. And I think your argument is we
13 can stop at level 1 and get rid of this counterclaim.
14 If we have to go on to level 2, it goes away anyway. So
15 here's my question, does Hovis have any outside limits?
16 That is, is the doctrine that's set by Hovis, you know,
17 is there some equitable principle that says that
18 nevertheless -- I mean, in this instance there's clearly
19 -- when you move to the summary judgment standard, I
20 think New York Life has some very good arguments that
21 I'm going to want to hear from Mr. Rodio on as to why
22 its conduct in this instance is reasonable throughout
23 and has enough indicia of good faith and there's no
24 countervailing evidence contrary that you grant summary
25 judgment. But focusing on that first principle, what

1 are the limits of it? So that if the insurance company
2 really is overtly behaving in bad faith yet you have a
3 death within contestability and then a filing of an
4 interpleader, are those two facts the only facts we need
5 to say okay, all counterclaims are gone?

6 MR. MAGRATTEN: I think I understand where you're
7 going in this.

8 THE COURT: I hope. Yeah.

9 MR. MAGRATTEN: And let's take an extreme case.
10 Let's take the case where a life insurer receives a
11 claim. There are issues to be investigated, life
12 insurer determines in year 1 that, yes the benefit is
13 payable but we just can't figure out to whom it should
14 be payable. We should file an interpleader, and then
15 they wait for five years because, hey, we're getting a
16 6% investment rate of return on this money and we only
17 have to pay out a 1% rate of return so let's just sit on
18 this. And the beneficiaries are screaming and lawyers
19 are writing nasty letters and all sorts of things are
20 happening. I think Hovis and the cases that we cite
21 with Hovis recognize that there may well be -- I mean,
22 this whole concept of interpleader is an equitable
23 remedy, and subject to equitable defenses of laches and
24 other equitable defenses, and clearly Ms. Ortiz has
25 seized upon that in her brief, she's raising laches. I

1 think the Court can determine this as a matter of law
2 because the Court and all parties now have the claim
3 file, and the claim file shows that as towards the very
4 end of 2013 when New York Life, despite all of its
5 efforts, realized we're just not going to get these
6 medical records. They're not available. And we're not
7 going to get any more information from Cranston Police
8 about Mr. Kaydea's criminal history. And the only thing
9 authorities are telling us is that it's an active
10 investigation. So we're stuck. It's at that point,
11 frankly, New York Life contacted me and said, okay, we
12 need to deposit these funds and we filed the complaint,
13 I believe it was in January perhaps early February of
14 2014 we started this process. I think the Court can
15 determine this from those undisputed facts whether as a
16 matter of law there's laches here or not. I should
17 think the legal answer to your question is the remedies
18 discussed in Hovis are subject to equitable defenses
19 which is laches.

20 THE COURT: Okay. I'd like -- I find the
21 insurance rate confusing.

22 MR. MAGRATTEN: The interest rate?

23 THE COURT: Yeah. I'm sorry, yeah, interest
24 rate.

25 MR. MAGRATTEN: So do I.

1 THE COURT: So I would really like to hear a
2 little bit on that.

3 MR. MAGRATTEN: Candidly, you know, I've been
4 doing this work for years and this is the first time
5 I've heard of this, but --

6 THE COURT: Yeah, I was struck by the lack of
7 case citations, the cases clarifying how to figure this
8 out.

9 MR. MAGRATTEN: And it's not because I didn't
10 look. I think as the Court is well aware, for an
11 insurer to sell a policy in a state like Rhode Island,
12 the form has to be approved and blessed by the insurance
13 department of DBR and any changes to the form has to be
14 reviewed and blessed by DBR, and this presents practical
15 issues to an insurer like New York Life is trying to
16 sell life insurance in fifty different states. The
17 process of getting approvals is laborious and is very
18 difficult. So apparently stemming from that difficulty
19 that the industry recognized is an interstate compact to
20 which Rhode Island has subscribed, and the compact
21 basically, as I understand it, the interstate compact
22 has a committee or a board made up of state regulators
23 from a variety of states and they will review policy
24 forms, and once reviewed and approved by this interstate
25 compact those forms can be sold in all the states that

1 subscribe to the compact. It's meant to be an easier
2 way for insurers to access these markets without having
3 to deal with multiple regulators. Rhode Island is a
4 subscriber. This policy sold was based on language that
5 has been approved by the interstate compact. That's on
6 the last page of the policy. There is a statutory
7 provision in Rhode Island laws that basically says that
8 the interstate compact will be the final arbiter of the
9 content. There's a typo and I realize that it
10 originated with my brief and then it was picked up in
11 Ms. Ortiz's brief, not context, content. And to the
12 extent there was a conflict under state law, it's the
13 content of the approved policy form that governs. So
14 here we have the policy form says that the prevailing
15 interest rate shall be set by the insurer depending on
16 the time of death, New York Life, the interest rate that
17 applied at the time of Mr. Kaydea's death was 1%.
18 There's a further provision for additional interest
19 under certain circumstances. We would contend do not
20 apply here. And you're right, unfortunately I did look
21 for case law that talks about this intersection between
22 the interstate compact and conflicting state law.

23 THE COURT: Yeah. So if I understand it right,
24 Rhode Island has a, assuming the scheme is as you've
25 described it, I have no reason to think that it might

1 not be, Rhode Island has a default rate in its statute
2 of 9% but that your argument is that if the insurer puts
3 a different insurance rate into its policy, and that
4 policy has been approved under the compact, then Rhode
5 Island law says our default rate doesn't apply, instead
6 the policy rate applies, which in this instance the
7 policy simply gives the discretion to New York Life, and
8 New York Life's rate is consistent with treasury rates
9 at the time and not 9%.

10 MR. MAGRATTEN: Correct.

11 THE COURT: So it's a substantial difference.

12 MR. MAGRATTEN: The language basically comes from
13 an approved form by the interstate compact which was the
14 internet reference in my brief. If you go there and
15 look, you'll see the policy form which is what they're
16 using. This is not language that New York Life invented
17 this is the language from the interstate compact.

18 THE COURT: So the function of the statutory 9%
19 is simply to provide for a default in a situation where
20 the policy is silent.

21 MR. MAGRATTEN: If the New York Life policy did
22 not address post-mortem interest at all, I think
23 Ms. Ortiz's argument would be correct that the state
24 statute supplies the law in that circumstance. But
25 here, I mean the Rhode Island statute addresses

1 specifically what happens when you have a conflict
2 between the terms of the policy and other Rhode Island
3 state law and it provides that the terms of the policy
4 prevail.

5 THE COURT: I'd also like to hear from you
6 briefly on attorney's fees in a situation like this.
7 The defendant has argued, and I haven't gone deeply
8 enough to have a sense, but sort of has an appealing
9 feel to it that an insurer doesn't get attorney's fees
10 for its sort of normal course of business and that a
11 contestability investigation described by you as
12 undisputedly in this instance, at least at commencement
13 routine, would fall into that category of an insurance
14 company doing its business and that it's not appropriate
15 for the Court to exercise its discretion to pay the cost
16 that the insurance company already builds into the
17 premium.

18 MR. MAGRATTEN: Correct. I mean there is a split
19 of authority on this. The old rule, and still the
20 prevailing rule in most jurisdictions, is in an
21 interpleader case, particularly where the stakeholder
22 itself has done nothing to cause the dispute that brings
23 everyone to court, the stakeholder should be allowed to
24 recover reasonable attorney's fees. There are some
25 decisions, this is a minority view, and it mostly comes

1 out of the west coast jurisdictions, that, Hey this is a
2 cost of doing business for the life insurer. A certain
3 number of these claims are going to result in an
4 interpleader practice, so the insurer should foot the
5 bill. And there are competing policy arguments here. I
6 mean not all interpleaders involve life insurance
7 companies. I think the general concept is the
8 stakeholder comes to court through no fault of its own.
9 There's no one suggesting here that New York Life had
10 anything to do with Mr. Kaydea's demise or the reasons
11 why he designated beneficiaries the way he did or the
12 reasons why Cranston authorities or Rhode Island
13 Attorney General's office cannot move along quicker in
14 its investigations, and for those reasons it's unfair to
15 tax New York Life with basically my fees for having to
16 come to court to ask for leave to deposit the policy
17 benefit. But there is a countervailing policy view --

18 THE COURT: Is there any law addressing the issue
19 in the circuit, in our circuit?

20 MR. MAGRATTEN: I think in our motion we do cite
21 several First Circuit cases.

22 THE COURT: Okay.

23 MR. MAGRATTEN: There's certainly First Circuit
24 precedent for awarding attorney's fees in --

25 THE COURT: If it's in your brief, I'll find it.

1 MR. MAGRATTEN: I believe it is. But we cite the
2 Sun Life Insurance case which is First Circuit 2009
3 affirming an award of about \$8,600 in attorney's fees,
4 an interpleader case involving 48,000 in insurance
5 proceeds. There's a Smith Barney Harris case, District
6 of Mass, 1994, and Foxboro Savings Bank case, District
7 of Massachusetts, 1999. Yeah, there is authority within
8 the First Circuit for (inaudible). And the other,
9 you'll see in the order that we propose, part of
10 interpleader relief is that New York Life would be
11 deemed upon depositing the funds with the registry of
12 the court, New York Life would be deemed to have fully
13 performed its obligation under the policy, the remaining
14 parties would be enjoined from prosecuting any claim to
15 those fees anywhere outside of this legal action, so the
16 idea is once New York Life has deposited the money it is
17 dismissed from the action, and the parties can, of
18 course, subpoena information from New York Life if they
19 need additional documents or need to depose anybody but
20 there's no need really for New York Life to remain in
21 the case for that.

22 THE COURT: All right, good. Thank you,
23 Mr. Magratten.

24 MR. MAGRATTEN: One footnote --

25 THE COURT: Oh, sorry.

1 MR. MAGRATTEN: I'm sorry, one footnote I need to
2 add.

3 THE COURT: Yes.

4 MR. MAGRATTEN: I was on the phone this morning
5 with Clare Parvin, the financial officer for the Court,
6 and according to Claire the funds can be deposited in
7 one of two ways. The easy way is to just cash deposit
8 into the registry of the court, non interest accruing
9 account, and the order we've prepared would allow just
10 that. If the parties want the funds deposited into an
11 interest bearing account, that under local rules
12 requires special language in the order and Claire sent
13 out a warning that if that's the road the parties want
14 to go down to the prevailing interest rates right now
15 are very low and there's a fee that goes to setting up
16 that kind of account. So economically it may not make
17 good sense to go down that road.

18 THE COURT: All right, good. Thank you. All
19 right, Mr. Rodio, Ms. Felix.

20 MR. RODIO: Good morning, your Honor.

21 THE COURT: Good morning.

22 MR. RODIO: Before I begin I want to thank the
23 Court for accommodating our CLE schedule last week and
24 rescheduling this hearing. I'm not sure we're any
25 smarter but we do have six or eight for credits.

1 THE COURT: Thank God for that. Everybody is
2 good to go for another year.

3 MR. RODIO: Your Honor asked a question about the
4 equitable nature of interpleader and we've cited a case,
5 we just dug it out, back from 1957 but it's still a good
6 case out of the District Court in New York, American
7 Wine Steamship Company vs Bowering & Company, and there
8 the Court notes very clearly that it's well established
9 that the remedy of interpleader is equitable in nature
10 and is governed by equitable principles. And the
11 federal interpleader act did not do anything to change
12 the equitable nature of an interpleader action.

13 I think, given that, and I think, and maybe I'll
14 regret saying this but it really seems like a rather
15 straight forward and almost intuitive legal analysis
16 when you're discussing interpleader, and particularly
17 when you put it in the nature of an equitable
18 proceeding. You have an innocent stakeholder who
19 through no fault of their own finds themselves with two
20 legitimate competing claims to a fund. They've do not
21 claim any interest in that fund, and they should not be
22 penalized by choosing one or the other.

23 In order to make those determinations, though, one
24 needs to bore down into the facts of the case in order
25 to determine, one, whether this is a completely innocent

1 stakeholder one needs to bore down into the facts, and
2 Mr. Magratten to his credit makes a very nice
3 superficial argument, I think, oh, we investigation and
4 contestability period and health records, et cetera, et
5 cetera, but what I'd like to do is bore down into those
6 issues a little bit and let's see how reasonable New
7 York Life's actions have been.

8 THE COURT: And, Mr. Rodio, let me just sort of
9 stop you there and give you my concern about your
10 argument, and that is that if the doctrine of laches
11 tells an insurance company that they've got to make a
12 decision and pay in a situation where there is an
13 ongoing murder investigation, in effect the Court would
14 be saying that equitable principles require that the
15 clever murderer be paid because the clever murderer has
16 covered up the tracks well enough that the investigation
17 takes longer than the legal laches pressure on the
18 insurer to just make a payment.

19 MR. RODIO: Sure.

20 THE COURT: It doesn't seem to me that's
21 consistent with equity.

22 MR. RODIO: And I completely understand that
23 question, and I struggled with it myself, and the
24 conclusion I've come to is we don't need to answer that
25 in this case because it has been 16 months, your Honor.

1 This didn't happen a month ago or two months ago or six
2 months ago. That's the first answer to that. There is
3 some period of time when an unsolved murder does not
4 allow an insurance company to hold on to a quarter of a
5 million dollars that doesn't belong to it. What that
6 precise amount of time is, I don't know and I'm glad I
7 don't have to answer it in that case, but I think
8 16 months is fair enough.

9 THE COURT: And I want to throw out the facts
10 that have grabbed me as I've looked at the papers, and I
11 must say I've looked at things what I would call very
12 superficially. I've been through, I think, all of your
13 papers. I've looked at some of the cases but I may have
14 missed things, I may have focused on the wrong things,
15 so that's why I want you to know what I'm thinking. A
16 couple of things that really strike me, first of all,
17 the period isn't the 16 months, it's really just right
18 up until the interpleader, and the interpleader is
19 initiated less than a year after the murder, if I've got
20 it right.

21 The second thing is that the police tell the
22 insurance company that your client is a person of
23 interest right out of the box, according to my notes
24 within a week of the receipt of the claim by your
25 client. I think somewhere in the file the police said

1 to New York Life, tell us if you're going to pay that
2 beneficiary these proceeds, that's got to send a red
3 flag up flying, then not very much time passes, it's
4 like basically we get through the summer and now they've
5 got the decedent's mom in the mix talking about don't
6 pay her, and then in September 6th, so we're still in a
7 pretty short timeline from the date of death, less than
8 six months, the police tell New York Life that they're
9 really hopeful that the investigation is going to close
10 in on somebody, and possibly even in as little as a
11 month. So for the insurance company to kind of hang
12 tight for another, I think, three months until the
13 insurance company hears from you, we're, you know, times
14 up, we're going to start to really put you under
15 pressure, and the insurance company looks at everything
16 on the radar screen that they've been able to get, and
17 all the things they haven't been able to get, and kind
18 of bottom lines it, I'm struggling to see any laches in
19 there.

20 MR. RODIO: On a pure laches analysis, I think
21 that's a fair summary, your Honor, with one, I think,
22 very significant exception, the police never mentioned
23 my client as a person of interest. The police said --

24 THE COURT: Well they said beneficiary.

25 MR. RODIO: -- family and beneficiaries --

1 THE COURT: But she's the beneficiary.

2 MR. RODIO: -- have not been ruled out which --

3 THE COURT: Right.

4 MR. RODIO: -- I mean, what does one expect, them
5 to say, your Honor? If Mr. Corley were here I think
6 he'd tell us he would have a field day if the police
7 started ruling people out before somebody was charged
8 and then later went back and changed their minds. I
9 think police procedure, and I'm certainly not, you know,
10 I spent a little time in the Attorney General's office
11 but that was long ago, but police procedure from a
12 common sense point of view is that you don't rule
13 anybody out unless and until somebody's been charged
14 with a crime. So the fact that my client wasn't ruled
15 out, the fact that other family members weren't ruled
16 out, it doesn't strike me as being all that significant.
17 Of course they weren't ruled out unless and until they
18 have specific leads. Not even specific leads. Unless
19 and until they've charged somebody with a crime. Could
20 you imagine if the police went on record and said, oh,
21 we're ruling out this person or that person, and then
22 they later change their mind, somebody like Mr. Corley
23 would just have a field day with that. It's almost per
24 se reasonable doubt.

25 THE COURT: Well, no question. But if I look at

1 what New York Life knew within, as its early stages of
2 its investigation are proceeding, it's just hard to call
3 it unreasonable at a level that, you know, kind of
4 starts to trigger bad faith because the insurance
5 company, first of all, is aware from your client tells
6 them that she wasn't on speaking terms with the decedent
7 at the time of his death, insurance policies with death
8 within contestability just raise red flags all over the
9 place, and then you've got a murder, and then you've got
10 somebody who supposedly has an insurable interest
11 according to the policy application, not on speaking
12 terms and unable to procure medical records for a person
13 with whom she supposedly had an insurable interest. I
14 mean, right there, and the police say the beneficiary of
15 the policy is a person of interest? How does that not
16 put the insurance company into the precise quandary that
17 is the paradigmatic interpleader situation which you
18 began at the outset by saying, of course, in that
19 situation there's no issue.

20 MR. RODIO: Understood, and that's why I concede
21 that as a matter of a pure laches analysis I think the
22 insurance company has a good argument. I think they
23 waited too long even under a pure laches analysis. I
24 think once that statement was made to them they say,
25 okay, these are not our funds. This could be a slayer.

1 And I'll get to that in a moment because --

2 THE COURT: Yes, but at what point -- is your
3 argument that they should have initiated the
4 interpleader earlier?

5 MR. RODIO: That's one of my arguments. My other
6 argument is --

7 THE COURT: Tell me when.

8 MR. RODIO: -- they should not have strung my
9 client along with lies for close to a year.

10 THE COURT: This is the medical record issue.

11 MR. RODIO: This is the whole issue of --

12 THE COURT: Let's focus on the first thing --

13 MR. RODIO: Okay.

14 THE COURT: -- which is when do you contend did
15 the delay in bringing the interpleader move into the
16 laches zone? When should they have filed it?

17 MR. RODIO: It's hard to separate the laches out
18 from the other of bad faith or inequitable conduct. But
19 assuming there was no other inequitable conduct,
20 assuming they weren't telling her one thing and doing
21 another, it would seem to me that three months for an
22 unsolved murder is long enough for an insurance company
23 to say we don't know what to do in this instance. And
24 we looked for cases, your Honor, on this and there are
25 none.

1 THE COURT: Yeah, that's what I was going to say,
2 are there any cases that say how long you float with an
3 unsolved murder before you have to do something?

4 MR. RODIO: I'm not the best researcher in the
5 world but we couldn't find anything. But, yeah, and
6 that is the issue, I suppose. I would make this
7 argument, though, under the Rhode Island statute a
8 slayer is someone who is responsible for the wrongful
9 death of another. I don't think it's up to the
10 insurance company to make a determination of what would
11 happen in the future, and I think if the insurance
12 company paid the proceeds out after a reasonable period
13 of time, and I'll suggest three months, to someone who
14 it was later found out was the slayer, I think the
15 insurance company is protected. I don't think the
16 insurance company is --

17 THE COURT: I don't know.

18 MR. RODIO: I don't think the insurance company
19 is bound by hindsight. I think the insurance company --
20 but be that as it may, after three months we don't know
21 who the killer is. We don't claim any interest in these
22 funds. We're giving our beneficiary, our insured's
23 beneficiary, a straight story which didn't happen here.
24 Let's just put these funds into interpleader. The facts
25 of this case are almost the polar opposite of that.

1 Number 1, oh, it's a contestability period, and your
2 Honor's mentioned that a lot, and it really -- I don't
3 think co-inflates with this issue of the slayer statute
4 at all. Whether Mr. Kaydea was murdered, when he was or
5 whether he was murdered ten years after that policy went
6 into effect --

7 THE COURT: Slayer is going to apply no matter
8 what.

9 MR. RODIO: The slayer is going to apply whether
10 we're in the contestability period or not. So those two
11 things really are separate in my mind. They used the
12 contestability period to essentially put her off, hold
13 off, hold off, give us this -- and we showed you in the
14 papers ten separate requests for medical records. We
15 showed the Court in the papers an affirmative
16 representation "you're the sole beneficiary". The only
17 thing that's missing are the medical records, so go get
18 the medical records. So what does this poor girl do?
19 She hires a lawyer who for reasons I can't fathom, tries
20 to open a probate estate for the decedent, is
21 spectacularly unsuccessful, at some expense, some great
22 expense to her considering her means.

23 THE COURT: Yeah. Let me stop there. You're
24 actually right that the interpleader based on the slayer
25 statute isn't linked to the contestability period. What

1 the contestability period allows the insurance company
2 to do is to search for suggestions of reasons why the
3 policy is void.

4 MR. RODIO: Exactly.

5 THE COURT: And it seems to me, and Mr. Magratten
6 has suggested a couple of hypotheticals, and I can think
7 of about 50 more, that there are lots of reasons why
8 someone whose death certificate says, you know, murder,
9 might nevertheless present a policy that's void and that
10 the kind of documentation that the insurance company is
11 looking for are not just standard in every
12 contestability investigation but also are the kinds of
13 documents that might very well expose either a health
14 issue or something that's revealed to a caretaker, a
15 medical caretaker, and that's reflected in notes, that
16 demonstrates some voidability issue that is what is the
17 focus of the insurance company, and for whatever reason
18 the insurance company got to January of 2014 and said
19 we've done enough, we're satisfied that there isn't a
20 voidability problem with this, all we've got is the
21 slayer statute, and therefore we're going to interplead
22 it. But it just seems to me that every single time
23 there's a death in the contestability period insurance
24 companies always do an investigation that involves a
25 survey of the medical records, and at the getgo they

1 don't know that your client can't procure them. They're
2 insuring -- they're assuming they've got someone with an
3 insurable interest who was identified in the policy as
4 about to become a wife, I think it said soon to be
5 spouse or something.

6 MR. RODIO: Intended spouse.

7 THE COURT: Yes, and so they make a routine
8 request, and she doesn't come back and say, oh, you
9 know, this is a guy I only kind of had a very short
10 relationship with and I'm not even speaking to him, and
11 I have nothing to do with him, and I'm not going to be
12 able to procure his medical records. She didn't say
13 that, right? So that attorney --

14 MR. RODIO: There's no record of that.

15 THE COURT: Yeah.

16 MR. RODIO: I'm not exactly sure of what her
17 lawyer said but certainly the insurance company was
18 aware that she was forced to open a probate because she
19 didn't have access to those with HIPA and all that
20 now-a-days.

21 THE COURT: But if she had been a common law wife
22 she would likely have been successful in opening. The
23 insurance company didn't know that. So I'm really
24 struggling to see how the request for medical records,
25 which is such a normal expected thing to do as part of

1 the contestability period investigation, rises to the
2 level of bad faith, because I think that's your
3 argument.

4 MR. RODIO: I respectfully disagree with your
5 Honor. I don't think it is a normal and expected thing.
6 If I buy an insurance policy today, and tomorrow I
7 perish in a car accident, my medical records --

8 THE COURT: They're going to get the same letter.

9 MR. RODIO: -- are irrelevant.

10 THE COURT: No. I think the same letter that
11 went out, I think -- and I may be wrong, I'll ask
12 Mr. Magratten --

13 MR. RODIO: Well, it could be but let's define
14 what a contestability period is. A contestability
15 period is a period of time, in this case two years, I
16 think, where the insurance company can void the
17 insurance based upon misrepresentations in the
18 application. That's what a contestability period is.

19 THE COURT: Correct.

20 MR. RODIO: It's not, oh, we found something we
21 didn't know about you or, you know, we shouldn't have
22 written this insurance for some reason. It is -- there
23 is a misrepresentation in the application and that
24 misrepresentation is connected to your cause of death.

25 THE COURT: Correct.

1 MR. RODIO: So there's no way to analyze this
2 without looking at the application, and that's what I
3 have in front of me, your Honor. First of all, with
4 regard to medical records, Mr. Magratten gave -- because
5 I tried to think of examples myself. Mr. Magratten gave
6 an example, oh, suppose he'd been stabbed five times in
7 the past. But they didn't ask that. There's nothing in
8 this medical questionnaire --

9 THE COURT: They ask about his criminal
10 experience.

11 MR. RODIO: Well, I'm going to get to that, but
12 if I could just let me go through very briefly the
13 medical questions. Do you have high blood pressure.
14 How does that relate to being murdered? Do you have
15 sugar or diabetes? Do you have shortness of breath? Do
16 you have cancer, tumor, ulcer? Do you have multiple
17 sclerosis? Do you smoke? Do you have a kidney
18 disorder? No, no, no. Do you have muscle weakness?
19 Have you been diagnosed with AIDS? Do you have chest
20 pressure? Have you had surgery? Your spouses and
21 natural parents, have they suffered angina, heart
22 disorder, stroke, diabetes, cancer? One can look at
23 this closely, and I have, and there's nothing in this
24 medical questionnaire that would relate in any way to a
25 person being murdered. So as my starting point here is

1 medical records are irrelevant. Any -- particularly
2 we're -- I'm an amateur at this. Mr. Magratten is a
3 heck of a lot better than me. But an insurance
4 professional saying I want to know if this policy is
5 contestable based upon medical misrepresentations, we'll
6 look at this and would say none of these things relate
7 to murder. Let's suppose he did have shortness of
8 breath or chronic bronchitis, how would that relate to
9 his being murdered? It wouldn't. So I think an
10 insurance professional, a reasonable insurance
11 professional, looking at this would say medical records
12 are irrelevant. We're in the contestability period,
13 yes, but medical records mean nothing in this case. And
14 having looked at it now, I believe they mean nothing.

15 Now, the only -- and just for the record, I'm
16 referencing page New York Life 0018 in the record,
17 that's the medical questionnaire, and the only other
18 part of the --

19 THE COURT: One question, Mr. Rodio, I'm
20 assuming, and it's probably in the record and I just
21 didn't find it yet, that the death certificate was part
22 of what your client provided in connection with her
23 claim?

24 MR. RODIO: That's right.

25 THE COURT: And that the death certificate shows

1 that the cause of death was murder?

2 MR. RODIO: Homicide. Strangulation by ligature
3 is the way it's put.

4 THE COURT: I assumed that was in there somewhere
5 but I hadn't found it.

6 MR. RODIO: So the other, and Mr. Magratten may
7 correct me when he gets up, but the only other potential
8 misrepresentation in the application, and the
9 application I'll just say for the record is New York
10 Life, and they put it in first, to their credit, because
11 it is the most important thing, New York Life 001
12 through -- well, my copy is cut off, I think it's 0020.
13 That's the entire application. The only other page that
14 I found that is even potentially relevant to a
15 contestability investigation is page 007, and that is,
16 and your Honor correctly pointed out, that's a question,
17 have you pled guilty to or been convicted of or been
18 imprisoned for any felony or misdemeanor, or are there
19 any such charges currently pending. I concede that a
20 misrepresentation on that question could potentially
21 implicate contestability in this case. I also know from
22 experience that one could get an answer to this
23 question, if not in 15 minutes certainly in a day. An
24 experienced investigator can get a BCI on someone, an
25 experienced -- I can go on the computer, anyone can go

1 on the computer and see if there are pending charges
2 against anyone. That literally, well not literally, but
3 I think that's a one hour investigation. It's certainly
4 not a one year investigation. That's the only other
5 portion of this application that I can find, not the
6 only other portion, the only portion of this application
7 that I could find that remotely could implicate
8 contestability. These are insurance professionals, your
9 Honor. They know what they're looking for. Is there a
10 misstatement in this policy that led to this death that
11 essentially tricked us into insuring him, right? That's
12 what contestability is all about. And I think an
13 insurance professional looking at this would say, well,
14 let's check whether he's been in prison for a felony or
15 misdemeanor, or whether there's any charges currently
16 pending, but that's the only potential investigation
17 they needed to do here, and that certainly didn't take
18 12 months, or 11 and 1/2 months, however long it came
19 for this interpleader.

20 Which brings me, I guess, maybe to the summary
21 judgment argument. I don't think that it is fair to
22 rule as a matter of law that this investigation -- the
23 details of which New York Life has only given us the
24 broadest outline of, that this investigation was
25 reasonable and necessary and went on for a period of

1 time that was required in order to do that. In fact, if
2 I were a factfinder, we're not here to find facts, but
3 if I were a factfinder, I think I would find exactly the
4 opposite. I think I would find five minutes with the
5 medical questionnaire and a reasonable insurance
6 professional would say that's irrelevant, and then ten
7 minutes looking up databases for felony or misdemeanor
8 convictions, and there's your contestability
9 investigation it's done.

10 Now, the second issue in whether -- in terms of
11 whether it's fair to find as a matter of law is can, or
12 should, the Court find as a matter of law that an
13 insurance company that essentially misleads a
14 beneficiary into believing that the only reason they're
15 not being paid their benefits are irrelevant medical
16 records is it fair to conclude as a matter of law that
17 that is not actionable? I don't think it is. I don't
18 think it is. I think to get back to your Honor's
19 original question, I think if New York Life had, and
20 there are ways to do this without offending anyone, but
21 if New York Life had informed Ms. Ortiz that this was an
22 unsolved murder, and that there were certain legal
23 prohibitions to paying claims with regard to an unsolved
24 murder, when the murderer had not been apprehended, I
25 think that would be reasonable, and I think if that

1 representation went on for two, or three, or four
2 months, I think that would be reasonable, as well. But
3 I think what's unreasonable is to tell her something
4 completely different than that. And your Honor asked
5 when she found out about the slayer statute, I'm not the
6 smartest person in the world, and I don't this that
7 often, but I can tell you the first time I found out
8 because I was befuddled as to why they weren't paying
9 this claim. It's when I got, or when Mr. Magratten
10 called me and told me that he would be filing an
11 interpleader and I said what's the deal? And he said
12 slayer statute, and that's when the lights went on in my
13 head. So I had no idea, and I've been with this case
14 two or three or four months at that point -- well, not
15 four months, but I'd been with this case certainly a
16 sufficient period of time that maybe I should have
17 thought of that, but I had no idea. Certainly my client
18 had no idea that the slayer statute was involved in any
19 way in this. We're thinking medical records, and then
20 we're thinking, well now we've put their feet to the
21 fire, we've showed them that medical records are
22 irrelevant, now they're going to file an interpleader.
23 Why? What's it all about? So that's when slayer
24 statute comes into the picture, and that's when this
25 really tragic statement from the decedent's mother, I

1 guess, comes into the picture. Of course we didn't know
2 about that, either. And the question there is, as a
3 matter of law, can the Court say that a distraught
4 mother, and anyone who's a parent, I mean, your heart
5 just goes out to this woman, but can the Court say as a
6 matter of law that a distraught mother saying no one's
7 going to benefit from the death of my son, does that
8 create a sufficient legal issue such that interpleader
9 is required. I don't think it does. I don't think
10 there's any cognizable claim that the decedent's mother
11 has to this insurance policy unless, and it's circles
12 right back to the slayer statute, unless my client's a
13 slayer. So the fact that the mother said this, it's
14 dramatic, it's heart-wrenching, but legally, I don't
15 think it means anything. I don't think it means
16 anything. The policy could not be clearer. If you're
17 the first beneficiary, we'll pay you as long as you're
18 living. If you're not living, we'll pay the second,
19 third, fourth, beneficiary. I mean that's -- it
20 couldn't be clearer.

21 THE COURT: Mr. Rodio, a question on a point you
22 made a moment ago, and I'm focusing on the insurance
23 company's admitted failure to advise your client that
24 the slayer statute was in play until they finished their
25 contestability investigation, probably pushed to finish

1 it by your demand letter. Are there any cases saying
2 that an insurance company has an affirmative duty to
3 advise a beneficiary if there is a question, either a
4 specific question under a slayer's statute -- I guess I
5 have some concerns about saying to someone who the
6 police are telling you is under investigation for murder
7 that you, the insurer, are suspicious that the person is
8 under investigation for murder, that there's a period of
9 time where the insurance company hoping that the police
10 will close the file and arrest somebody else, are
11 reluctant to say to their -- the beneficiary, their
12 insured, we think you're a murderer and there's -- you
13 know, if she really is the murderer, there's a clear
14 downside to saying that. If she's really not the
15 murderer, there's a clear downside to saying that. And
16 that therefore with the police actively investigating
17 and saying, as they did in September, hang on, we think
18 we're going to solve this, is there a duty, and are
19 there any cases that talk about the duty that the
20 insurance company finds itself in? I'm, you know, just
21 looking factually at the situation New York Life found
22 itself in. I'm finding it hard to criticize them for
23 not believing at some point prior to the filing of the
24 interpleader we have a duty to tell this lady that the
25 slayer statute is either, as you would argue, the only

1 reason for our delay or, as they would argue, moving in
2 tandem with our contestability investigation, and only
3 when the first, the second one runs out, and ends, do we
4 then have no choice but to go public with that
5 accusation? But I'm uncomfortable with saying that an
6 insurance company has an affirmative obligation to alert
7 the beneficiary in those circumstances.

8 MR. RODIO: Yeah, and I completely understand,
9 and that's why I thought that -- that's why I mention
10 that I think there are sensitive artful ways of saying
11 that. I don't know if the insurance company has an
12 affirmative duty to say that, we'll look that up, but
13 here's what I do know, the insurance company has an
14 affirmative duty not to misrepresent to her the reason
15 it's not paying, and that's where we're coming from
16 here, both as a purely legal matter, the insurance
17 company makes a representation, that representation is
18 false, she relies upon that false representation, she
19 goes out and spends money and takes time in reasonable
20 reliance. That's a pure legal misrepresentation claim.
21 On the equitable side of things, getting back to the
22 initial point I made interpleader is an equitable
23 action, is it equitable to not just not affirmatively
24 represent why you're not paying, but to misrepresent why
25 you're not paying --

1 THE COURT: Yeah. So, in other words, you're
2 saying there's a factual dispute here as to whether or
3 not this insurance company five minutes into their
4 contestability investigation knew there's no voidability
5 thing here.

6 MR. RODIO: Yeah, and --

7 THE COURT: We're in slayer statute mode and we
8 got to lie to the beneficiary to sort of hold the status
9 quo until we can figure out what to do.

10 MR. RODIO: I think they've confirmed that. They
11 didn't get any medical records. They didn't get any
12 more criminal records, not that they've told us, at
13 least, and now they're willing to pay. So they got none
14 of the information that withheld payment, supposedly
15 withheld payment for a year, but now they're prepared to
16 pay. I think -- here's what I think, and it's
17 speculation but it's useable speculation, I think they
18 got my letter. They said: Oh, my God, there's a Rhode
19 Island statute that doesn't allow us to void the policy
20 for any misrepresentation, what are we going to do now?
21 And that's when they came up with this interpleader in
22 this supposed contest for the funds. I think until that
23 point, I think they were just stalling or looking for
24 some misrepresentation unrelated to the manner of his
25 death that could lead them to not pay under the policy,

1 which gets me back to his mom's statement that no one's
2 going to profit from my son's death. I mean, the sad
3 irony here is that the insurance company is the only one
4 that's profited. No one would argue that having a
5 quarter million dollars in a bank account for the last
6 18 months is not a financial benefit. So the insurance
7 company is the one that's profited thus far based upon
8 this case.

9 THE COURT: Well, the insurance company, I think,
10 would probably say no, by the time you're done with
11 attorney's fees and interest, unless I award them their
12 fees, it's truly a wash for them.

13 MR. RODIO: Well, yeah, and one would hope --

14 THE COURT: Once they put it into interpleader
15 then I don't think the argument that the insurance
16 company has benefited works all that well.

17 MR. RODIO: Yeah, if the Court permits them to
18 put it into interpleader, which we resist because we
19 think that all that does is it cuts off the interest
20 obligation and it insulates them from further interest
21 liability for their wrongful actions. So that's why
22 we're resisting interpleader. There's no real contest
23 to this fund, your Honor. There's no real contest.
24 If the Court makes the ruling that, listen 16 months is
25 long enough, because there's no magic to it, 16 months

1 isn't long enough, is 18, is 24, is 38? I mean, we
2 don't know. But I think it's reasonable to conclude
3 that 16 months is long enough. If 16 months is long
4 enough, these funds shouldn't go to interpleader, they
5 should go to Ms. Ortiz who's the beneficiary of this
6 policy. So that's where we are on this interpleader
7 action. We don't want the insurance company to have the
8 benefit of putting -- we are in a obviously very low
9 interest rate environment, and maybe it doesn't even
10 make sense to put it into an interest bearing account.
11 But we don't think the insurance company should have
12 that benefit because of its interpleader action. Had it
13 done so, had it filed this interpleader in a couple,
14 three, four, five months, I won't be taking this
15 position. Had it not misrepresented to her the reason
16 it wasn't paying her, I wouldn't be taking this
17 position. But this is a very different case. It's a
18 very different case from the one that -- actually, it's
19 been an interesting legal research because you don't
20 very often to get to read about murders and things like
21 that. I don't know if your Honor saw that Judge Posner
22 case that there was a Nicole Kidman movie To Die For and
23 she had teenagers murder her husband. It sounds exactly
24 -- that Judge Posner case sounds exactly like that, wife
25 has an 18 year old and two 16 year old accomplices

1 murder her husband and then she's not entitled -- of
2 course she was a convicted murderer at the time the
3 Court made its decision so it's really not applicable to
4 this case, but the question becomes who then takes the
5 insurance policy. But Hovis, I mean Hovis doesn't help
6 the insurance company at all here. Hovis is a case
7 where an insurance salesman sells an elderly widow a
8 policy, two years later goes back to his company, when
9 she's on her deathbed and says she wants to add me as a
10 beneficiary, there's an internal investigation because
11 they don't allow their salesmen to get on policies
12 unless there's approval, she dies while the
13 investigation is going on, it's later approved, and then
14 there's an issue of was it really her signature. We
15 can't tell because she was so old and elderly. I mean,
16 those are compelling facts for an interpleader. We
17 didn't pay this lady and didn't tell her why, in fact
18 misrepresented why for a year, and now we have a
19 different theory, those are not compelling facts for an
20 interpleader.

21 THE COURT: Yeah. I'll tell you candidly,
22 Mr. Rodio, I find this is a good interpleader case so
23 that the real thing that's of concern to me is whether
24 there's a period of time where the insurance company
25 knows there's no voidability issues yet the police are

1 stringing them along on the investigation, making them
2 think we're going to close this investigation, which
3 would give clarity, eliminate the problem. So they
4 delay for a period of time where they're no longer
5 really worried about contestability. That period is
6 fairly short, so really does it really get us into the
7 laches zone? And then they file the interpleader. It's
8 hard for me to -- I'm going to do a deep dive and I want
9 to go read all the cases, and I may change my mind on
10 this, but my reaction at the moment is that this is a
11 paradyamic interpleader situation with enough evidence
12 that the slayer statute may ultimately be found
13 appropriate as to your client, and a secondary
14 beneficiary very passionate about those issues. I don't
15 see that the insurance company had any choice. I mean,
16 I don't think one of the reasonable choices on the table
17 for the insurance company was pay the policy to
18 Ms. Ortiz. So the real issue is, what's the legal
19 significance of a factual dispute regarding whether at
20 some point the contestability investigation was really
21 petering out and yet they don't initiate the
22 interpleader because the police are telling them we're
23 going to solve it.

24 MR. RODIO: Well, understood, your Honor, and the
25 only point I would make to that is if the Court does

1 allow the interpleader that does not mean that the seven
2 counts that we've raised, for breach of contract, bad
3 faith, et cetera, et cetera, go away. That does not
4 implicate the interpleaded fund. Those are separate and
5 apart from the interpleaded funds, so I'm not sure how
6 --

7 THE COURT: Yeah --

8 MR. RODIO: -- I'm not sure how New York Life
9 reaches that far in this case.

10 THE COURT: Okay.

11 MR. RODIO: Thank you, your Honor.

12 THE COURT: All right, thank you. I think
13 Mr. Magratten will be seeking what might be the last
14 word, maybe not?

15 MR. MAGRATTEN: Just briefly, your Honor.
16 Ms. Ortiz is advancing the argument that it was obvious
17 the medical records was a red-herring here. But I think
18 the -- what the handicap that the Court and all the
19 parties are operating under is we just don't know the
20 circumstances of death. You can envision a
21 hypothetical, for example, where Mr. Kaydea died in a
22 drug deal gone bad, and one of the questions, medical
23 questions is do you have any history of drug abuse, have
24 you taken any illicit medication -- any illicit drugs,
25 and he said no. Medical records intending to show a

1 history of drug abuse could be quite relevant to this,
2 and support a policy recision. So I think it's an
3 overstatement to say that medical records here, the
4 search for medical records was completely immaterial.

5 Mr. Rodio said, and I think this is an important
6 point to clarify, Mr. Rodio said that to date the
7 insurance company has only given the broadest outline of
8 its investigation. As part of New York Life's Rule
9 26(a)(1) initial disclosures, New York Life has provided
10 its complete file on this. In a privilege log, there's
11 some attorney/client information in there that was
12 redacted but basically all parties now, and it's all --
13 the complete file is attached to the motion papers so
14 the Court and all parties have New York Life's complete
15 file on this. The only additional information that
16 could be obtained about the investigation will be
17 perhaps the interviews or depositions of the
18 investigator or New York Life's staff.

19 And, finally, there's been this argument about a
20 misrepresentation that at some point New York Life told
21 Ms. Ortiz the only reason we're not paying you is you
22 haven't given us medical records yet. But I think if
23 the Court looks, and the file contains the actual
24 correspondence, I'm looking at a June 4 letter from New
25 York Life to Ms. Ortiz. What New York Life says is: We

1 are writing regarding the pending death claim under the
2 above-captioned policy. We are in the process of
3 conducting inquiries that include obtaining copies of
4 the insured's medical records from the doctors and
5 hospitals that treated the insured. As soon as our
6 inquiries are completed, you will be hearing from us
7 further regarding the matter. I think it's a stretch to
8 infer from that language that New York Life is telling
9 her, Look, the only reason you're not being paid is you
10 haven't given us medical records. They cite that as one
11 of the things they're looking at. But that's -- I don't
12 think that supports the misrepresentation.

13 THE COURT: One question, Mr. Magratten. If this
14 were a situation where we weren't in the contestability
15 period, but New York Life gets the death certificate and
16 goes, oh, murder, makes a phone call to the police and
17 learns that the beneficiary they're about to cut the
18 check to is a person of interest in connection with the
19 murder investigation, but you're not in the
20 contestability period, how long does the insurance
21 company have to initiate an interpleader proceeding
22 without being tagged with laches?

23 MR. MAGRATTEN: I would argue that the relevant
24 issue there is not so much time but activity. I would
25 argue that the burden then falls on the insurer to

1 maintain contact with authorities, gather as much
2 information about the case implicating the beneficiary
3 in the murder, and as long as there's reasonable hope
4 that more information is coming, that there will be an
5 arrest, or that there won't be an arrest, or that the
6 beneficiary is going to be exculpated, I think the
7 problem would lie where you have a life insured that's
8 doing nothing and just waiting for the police department
9 to call and say, okay, you can cut the check. But I
10 think as you look through the claim file you'll see
11 there's a fairly steady stream of activity through the
12 spring of 2013 into early 2014, frequent contact with
13 investigators. They're reaching out -- unfortunately
14 they're just getting the same line which is it's a very
15 active investigation, it's ongoing, no one can be ruled
16 out. I think in the backdrop to the original statement
17 from investigators, or from the authorities, that
18 Ms. Ortiz was a person of interest, I think New York
19 Life, or any insurer in that situation, acts reasonably
20 not to pay the claim immediately to see how the
21 investigation turns out.

22 THE COURT: All right, thank you.

23 MR. RODIO: Can I just make one point?

24 THE COURT: Yeah, I was going to give you --

25 MR. RODIO: Oh, thank you.

1 THE COURT: -- the real last word, and I also had
2 a couple of minor questions for you, so --

3 MR. RODIO: Yeah. I just did want to point out
4 that Ms. Ortiz's affidavit, at paragraph 13, says
5 beginning in May of 2013 New York Life repeatedly
6 informed both me and my attorney that it needed medical
7 records, I'm paraphrasing at this point, before it could
8 pay me death benefits. And then the very next
9 paragraph, 14, uncontested. Before filing this suit,
10 New York Life stated no other reason for refusing to pay
11 me the policy benefits. So that is on the record, your
12 Honor. I just wanted to point that out.

13 THE COURT: Okay. Don't sit down. The
14 undisputed fact regarding the routine nature of the
15 investigation, what I said at the beginning to Mr.
16 Magratten is that, and would you agree that this is
17 what's undisputed, that the very first letter that went
18 to your client, I think May 2nd of 2013, which appears
19 to me to be a routine contestability period letter, that
20 says sorry for the loss, obviously they have no idea
21 that this lady hasn't lost anything. She's no longer
22 even in contact with this guy, so it looks like a
23 routine letter, and then the investigation moves, and I
24 think Mr. Magratten agrees that it becomes non-routine
25 later in the investigation. So I think your factual

1 dispute with regard to that word routine, my question is
2 whether you would agree that it's undisputed that at
3 least as of
4 May 2 of 2013 this was routine.

5 MR. RODIO: Yeah, I think that's a question
6 for -- probably, but I do think that's a question for an
7 industry expert. If and when this case goes to trial, I
8 expect that we'll put somebody on the stand to say this
9 is how these matters are typically handled within the
10 industry, and I expect that that person will say, you
11 know, within a month, whatever it was, quote/unquote,
12 routine, it should have been very evident to New York
13 Life that it was no longer routine.

14 THE COURT: Yeah. I mean clearly that's
15 disputed.

16 MR. RODIO: Right.

17 THE COURT: But that that initial, you know,
18 three days after your client had contacted them --

19 MR. RODIO: Yeah, I don't think you can fault
20 them.

21 THE COURT: -- it's routine.

22 MR. RODIO: I don't think you can fault them.

23 THE COURT: And here's my other question. If the
24 Court, if I recommend the interpleader, I want to make
25 sure that I deal with the interest bearing versus

1 non-interest bearing issue. From your client's
2 perspective, would you, if we get to that point, and
3 that's the recommendation that I make, would you want me
4 to recommend that before a final order is entered the
5 Court give you the opportunity to make a decision as to
6 whether or not it goes to interest bearing with fees
7 that may wipe out the interest or that it go straight
8 into Claire Parvin's account and does not carry
9 interest?

10 MR. RODIO: Yes, we would appreciate that
11 opportunity. Or, and I don't even know if this is
12 within the Court's purview, but or an opportunity to put
13 the funds in a joint account at Merrill Lynch or at
14 Fleet National Bank, requiring signatures of all the
15 parties to remove it where maybe the fees wouldn't be
16 the same and maybe there would be a little more interest
17 I don't know.

18 THE COURT: Yeah, I don't -- Mr. Magratten you
19 may know whether that's something that works in the
20 world of interpleader.

21 MR. MAGRATTEN: I think that's a little outside
22 the usual interpleader box.

23 THE COURT: Yeah.

24 MR. MAGRATTEN: I can tell you, I think New York
25 Life would prefer not to go down that road. That would

1 require it to have an attorney involved, signing off on
2 documents and --

3 THE COURT: And more expense.

4 MR. MAGRATTEN: Paperwork and more expense, yes.

5 THE COURT: Yeah. All right.

6 MR. RODIO: Although we hope Mr. Magratten stays
7 with us, your Honor.

8 THE COURT: Well, I understand that. And he
9 hopes he doesn't. And I can't tell you one way or the
10 other because we will take this under advisement.
11 Frankly I think Judge McConnell recently published a
12 decision in the insurance context that said who said
13 insurance law is boring. I think this case illustrates
14 that point, perhaps even more so. So I will be taking
15 this under advisement. It will take me some time
16 because I want to really go deeply into the facts, map
17 them out and look at all of the cases you've cited and
18 probably do some research of our own. But we'll try to
19 get you a decision within a reasonable period of time.

20 MR. RODIO: Thank you, your Honor.

21 MR. MAGRATTEN: Thank you, your Honor.

22 THE COURT: All right, Court will be in recess.

23 (RECESS)
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C E R T I F I C A T E

I, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/JOSEPH A. FONTES

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